



## **Admissibility of Prior Inconsistent Statements**

December 4, 2017



## **Overview**

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- Background
- State Admissibility Rules
- Legal Considerations
- Policy Options



## Background

- During the Regular Session of the 2017 General Assembly, Senator Janet D. Howell introduced Senate Bill 1445 (SB 1445).
- This bill was referred to the Crime Commission by the Senate Courts of Justice Committee.
- The Executive Committee authorized a review of the subject matter of SB 1445.

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## Background

- During a criminal trial, a witness may sometimes recant a statement they made prior to the trial.
  - This may be more common in certain cases, such as domestic violence, gang activity, and human trafficking; but, can occur in any criminal matter.
- Under current Virginia law, a prior inconsistent statement is admissible to impeach the credibility of the testifying witness.
- Under SB 1445, the prior inconsistent statement would be admissible as substantive evidence to be considered by the trier of fact in determining guilt.

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## Background

Two rules regarding the admissibility of prior inconsistent statements:

Common Law/Orthodox Rule: out of court statements are treated as hearsay and can only be used to challenge the credibility of a witness.

- Prior statement is not sufficiently reliable to be introduced as substantive evidence because it was not under oath, before the trier of fact, and subject to cross-examination.
  - New York, North Carolina, and Virginia.

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## Background

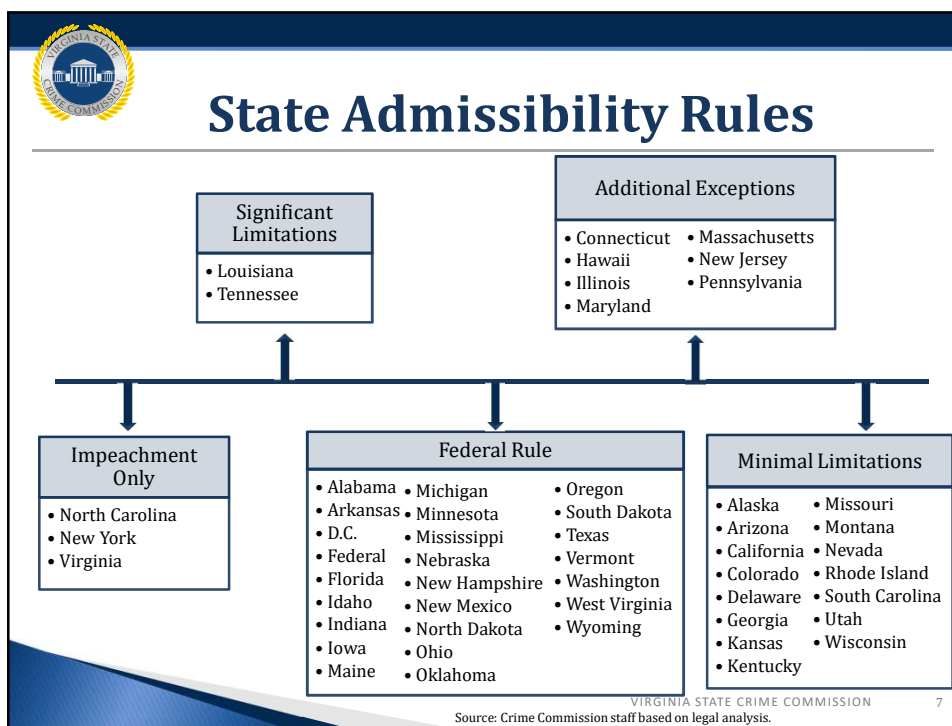
Two rules regarding the admissibility of prior inconsistent statements:

Modern Rule: out of court statements are admissible as substantive evidence of the defendant's guilt.

- The trier of fact can consider all relevant evidence, observe the demeanor of the witness, and hear an explanation for any discrepancy between statements of the witness.
  - 47 states, D.C., and federal law.

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**State Admissibility Rules**

**Significant Limitations to Admissibility (2 states):**

- Louisiana: there must be additional evidence to corroborate what was asserted by the prior inconsistent statement.
- Tennessee: the prior statement must have been audio or video recorded, a written statement signed by the witness, or a statement given under oath; and the court must conduct a hearing to determine the trustworthiness of the statement by a preponderance of the evidence.

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## State Admissibility Rules

### Federal Rule (23 states, D.C., and federal law):

- A prior inconsistent statement is admissible if it was given under penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.
- Texas: follows the federal rule but explicitly prohibits the introduction of testimony given at a grand jury proceeding.

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## State Admissibility Rules

### Admissible with Additional Exceptions (7 states):

- Connecticut: prior statement is admissible if it is in writing or was recorded by audiotape, videotape, or some other reliable medium.
- Illinois: SB 1445 is modeled after the Illinois rule.
- Pennsylvania: prior statement is admissible under the federal rule, or if it was in writing signed by the declarant, or if it was a verbatim contemporaneous electronic recording of an oral statement.

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## State Admissibility Rules

### Minimal Limitations to Admissibility (15 states):

- South Carolina: the prior statement must be inconsistent with the declarant's testimony at trial.
- Missouri: a prior inconsistent statement "shall" be admissible as substantive evidence.

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## Legal Considerations

### Does the introduction of a prior inconsistent statement violate the Confrontation Clause?

- The Constitution guarantees a defendant the right to confront witnesses in a criminal trial.
  - The proposed legislation would not violate the Confrontation Clause under the standard set forth in Crawford v. Washington, 541 U.S. 36 (2004).
- All of the state statutes and rules allowing for the admission of a prior inconsistent statement as substantive evidence require that the declarant *testify* and be subject to *cross-examination*.

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## Legal Considerations

### What qualifies as an inconsistent statement?

- The statement has a reasonable tendency to discredit the direct testimony on a material matter. Materiality is within the discretion of the trial court. People v. Williams, 147 Ill. 2d 173, 244 (Ill. 1991).
- The statement does not have to directly contradict trial testimony, but can include evasive answers, silence, or changes in position. People v. Martinez, 348 Ill. App. 3d 521, 532 (Ill. App. Ct. 2004).

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## Legal Considerations

### What qualifies as an inconsistent statement?

- A claim of memory loss regarding a prior out-of-court statement does not preclude its admission as substantive evidence. People v. Hampton, 387 Ill. App. 3d 206 (Ill. App. Ct. 1st Dist. 2008).
- Utah: rule provides that a prior statement is admissible if it is inconsistent with the declarant's testimony, or the declarant denies making the statement, or the declarant has forgotten.

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## Legal Considerations

- How would the use of prior inconsistent statements impact victims of crime?
  - Would this result in more victims being prosecuted for perjury, in essence re-victimizing the victim?
- Would varying discovery practices throughout the Commonwealth result in greater advantages or disadvantages to defendants under a new rule?
  - A provision could be added to any new rule, similar to Va. Code § 19.2-268.3(C), requiring that notice and a copy of the statement be provided to the opposing party in advance of its use at trial.

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## Policy Options

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## Policy Options

**Policy Option #1:** Amend existing law to allow for the introduction of prior inconsistent statements as substantive evidence, which could include:

- Adopting SB 1445 as introduced; or,
- Allowing for the admission of such statements using some other combination of criteria.
  - Will advance notice and a copy of the statement be required prior to introducing the statement?

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## Policy Options

**Policy Option #2:** Maintain the status quo.

- Prior inconsistent statements would remain admissible only for impeaching the credibility of the witness, unless some other exception exists under the law.

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## Discussion